

MANDATE

**United States Court of Appeals
For the First Circuit**

No. 06-1550

UNITED STATES,

Appellee,

v.

ROBERT D. ARNOLD,

Defendant, Appellant.

Before

Boudin, Chief Judge,
Torruella and Lipez, Circuit Judges.

JUDGMENT

Entered: July 17, 2007

In this sentencing appeal, defendant argues that the district court misunderstood its authority to grant a diminished capacity departure under USSG § 5K2.13. The record reveals that the district court considered defendant's argument about his diminished capacity but did not grant a USSG § 5K2.13 departure because of defendant's repeated failure to address his drug and alcohol problems and the need to protect the public. This decision was proper because USSG § 5K2.13's policy statement prohibits a downward departure where "(1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; [or] (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public." Thus, the district court did not misunderstand its departure authority under USSG § 5K2.13.

We note that defendant makes no argument that the sentence was unreasonable under post-Booker advisory guidelines.

The government's motion for summary disposition is granted for the reasons discussed above. Affirmed. See 1st Cir. R. 27.0(c).

By the Court:

Richard Cushing Donovan, Clerk.

Certified and Issued as Mandate
under Fed. R. App. P. 41.

Richard Cushing Donovan, Clerk

Linda Baez
Deputy Clerk

MARGARET CARTER

By: _____
Chief Deputy Clerk.

Date: AUG 31 2007

[cc: Messrs: Barend, Feeley and Ms. Chaitowitz]